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**IN THE  
COURT OF APPEALS OF INDIANA**

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JILL HOFFMAN-WAUGH and DEL WAUGH,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 29A02-0610-CV-866
	)	
ROSEMARY McGROGAN,	)	
	)	
Appellee-Defendant.	)	

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable Daniel J. Pfleging, Judge  
Cause No. 29D02-0306-CT-515

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**August 17, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Appellant-Plaintiff Jill Hoffman-Waugh (“Hoffman-Waugh”) appeals a jury verdict, finding her one hundred percent at fault and Appellee-Defendant Rosemary McGrogan (“McGrogan”) zero percent at fault. We reverse and remand.

## **Issue**

Hoffman-Waugh raises the issue of whether the trial court erred in refusing to give a jury instruction that, unless having notice to the contrary, a driver with the right of way has the right to assume that the non-preferred driver will obey the traffic laws.

## **Facts and Procedural History**

On February 20, 2002, Hoffman-Waugh and McGrogan were involved in an automobile accident at the intersection of Old Meridian Street and Guilford Road in Carmel, Indiana. As a result, both cars sustained damage and Hoffman-Waugh suffered personal injuries.

Hoffman-Waugh was driving her car northbound on Old Meridian, approaching the intersection. At the intersection, there are stop signs for traffic traveling east and west on Guilford, but no signs requiring traffic on Old Meridian to stop. Hoffman-Waugh testified that as she approached the intersection she saw McGrogan’s vehicle traveling westbound on Guilford “about a second or two” before entering the intersection. Trial Transcript at 18. She said at that point she realized that McGrogan’s car was “not going to stop” because “it was coming at too high of speed.” Id. When asked how fast she was driving before the accident, Hoffman-Waugh responded “not even 40 miles an hour.” Id.

McGrogan testified that she had stopped at the intersection and started to cross Old

Meridian when her car was hit by Hoffman-Waugh's car. She said that she was driving at "probably ten miles an hour, very slowly." Id. at 110.

At the end of the testimony, both parties submitted final jury instructions to be considered by the trial court. One of the instructions submitted by Hoffman-Waugh read as follows:

Under Indiana law, unless a driver has notice to the contrary, she has the right to assume that others who owe her a duty of reasonable care will exercise that care. In particular, the preferred driver has the right to assume that the non-preferred driver will obey the traffic laws and is not required to proceed overly cautiously into an intersection and to be cognizant of everything in plain view.

("Preferred Driver Instruction") Appellant's Appendix at 71. The trial court recognized that the instruction is supported by caselaw, but refused to tender the instruction to the jury indicating that it placed too much focus on the issue combined with the two other instructions on negligence. However, the trial court permitted counsel to make arguments in closing statements as to the preferred/non-preferred issue.

The instructions provided to the jury as to negligence and standard of care were:

Every driver of a motor vehicle has a duty to exercise the care an ordinarily prudent person would use, under the same or similar circumstances. The failure to use such care is negligence.

Every driver has a duty to maintain proper lookout. A driver has an obligation to see or hear that which should be seen or heard through the exercise of reasonable care. A person is negligent if she fails to maintain a proper lookout.

Appellant's App. at 69-70.

During his closing arguments, Hoffman-Waugh's counsel did make an argument based on the premise of the rejected instruction:

In other words, ladies and gentlemen, I think the inference is that Mrs. McGrogan just didn't look and drove through. She disregarded this traffic control, this stop sign. And Jill Hoffman-Waugh had the right-of-way as she was traveling north and that the failure to exercise reasonable care was twofold. Number one, the failure to maintain a proper lookout to see a driver or a vehicle with the right-of-way traveling up that road and, secondly, disregarding the stop sign.

Tr. at 149.

Following deliberations, the jury returned a verdict in favor of McGrogan, finding Hoffman-Waugh one hundred percent at fault. Hoffman-Waugh now appeals.

## **Discussion and Decision**

### **I. Standard of Review**

Whether to give a tendered jury instruction is left to the discretion of the trial court. Lee v. Hamilton, 841 N.E.2d 223, 229 (Ind. Ct. App. 2006). The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Id. at 230. In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction (1) correctly states the law, (2) is supported by the evidence of the record, and (3) is covered in substance by other instructions. Wal-Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 893 (Ind. 2002), reh'g denied. Errors in instruction are harmless and do not require reversal where the verdict would have been no different had the jury been properly instructed. City of Terre Haute v. Simpson, 746 N.E.2d 359, 367 (Ind. Ct. App. 2001), trans. denied.

### **II. Analysis**

Hoffman-Waugh argues that the jury was not properly instructed because the trial

court refused to use the Preferred Driver Instruction, resulting in a prejudiced verdict. Both parties agree that the Preferred Driver Instruction correctly states the law. However, they disagree as to whether the instruction is supported by the evidence, covered in substance by other instructions, and whether the refusal to give the instruction ultimately resulted in prejudice.

The quantum of evidence necessary to support the use of an instruction is evidence and reasonable inferences therefrom, which, when viewed in the light most favorable to the proponent, would support a jury verdict on the theory contained in the instruction. Shull v. B.F. Goodrich Co., 477 N.E.2d 924, 927-928 (Ind. Ct. App. 1985), trans. denied.

Here, Hoffman-Waugh was driving on Old Meridian, which did not have a stop sign at the intersection, while McGrogan was required to stop before crossing over Old Meridian to continue on Guilford. Therefore, the evidence does support that Hoffman-Waugh had the right-of-way or, as designated by the Preferred Driver Instruction, was the preferred driver. Thus, McGrogan was the non-preferred driver because there was a stop sign at the intersection in her direction of travel.

While acknowledging that Hoffman-Waugh was the preferred driver, McGrogan contends that evidence was presented that Hoffman-Waugh did have notice of McGrogan's vehicle, requiring Hoffman-Waugh to look left and right before proceeding through the intersection. ("Under Indiana law, unless a driver has notice to the contrary, she has the right to assume that others who owe her a duty of reasonable care will exercise that care.") As evidence of such notice, McGrogan notes that Hoffman-Waugh testified that she was driving "not even 40 miles an hour" and saw McGrogan's car "a second or two at the very most

before” the intersection, and had engaged her clutch in an attempt to apply her brakes. Tr. at 18. However, the duty to keep a proper lookout and use reasonable care does not require a motorist to perform impossible feats to avoid a collision. Schultz v. Hodus, 535 N.E.2d 1235, 1238 (Ind. Ct. App. 1989), trans. denied. This evidence is not enough to support a conclusion that Hoffman-Waugh had sufficient notice that McGrogan was not going to stop her vehicle as required. See McDonald v. Lattire, 844 N.E.2d 206, 214 (Ind. Ct. App. 2006) (“This was not a case where Elgar’s vehicle was simply stopped in the road, an obstruction around which one would have to maneuver. . . . Further, this was not a situation where Lattire noticed Elgar’s vehicle and then had four seconds to react (blink lights, brake, honk horn) to avoid the accident.”). Therefore, the evidence supported the Preferred Driver Instruction.

Finally, the substance of the instruction was not covered by the other instructions given at trial. The jury was instructed on the general law of negligence and comparative fault. However, it was not instructed that a preferred driver with the right-of-way has the right to assume that the non-preferred driver will obey the traffic laws and is not required to proceed overly cautiously into an intersection and to be cognizant of everything in plain view. The trial court’s refusal of Hoffman-Waugh’s tendered instruction amounted to an abuse of discretion.

In concluding that the trial court erred in refusing to give this instruction, we must determine whether the error substantially prejudiced Hoffman-Waugh in the presentation of her case. Here, McGrogan’s primary argument for comparing fault was whether Hoffman-Waugh had maintained a proper lookout and implied that a similar duty existed for both drivers when approaching the intersection. However, the drivers’ duties were not the same

because Hoffman-Waugh had the right-of-way and by law could assume that McGrogan would obey the stop sign. The jury returned a verdict for McGrogan, finding Hoffman-Waugh one hundred percent at fault. We conclude that the trial court's failure to properly instruct the jury likely affected the verdict.

Reversed and remanded for a new trial.

SHARPNACK, J., and MAY, J., concur.